



July 8, 2013

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Stephanie A. Joyce

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Re: WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*

Dear Ms. Dortch:

Securus Technologies, Inc. (“Securus”) hereby responds to the *ex parte* letter filed by counsel to Martha Wright, *et al.* (the “Wright Petitioners”) on June 19, 2013 (the “Wright Letter”).¹

The Wright Petitioners appear to be urging the FCC to set rates for *intrastate* inmate calling services. They cite no statute, order, rule, or precedent to support such a request. They concede, as they must, that the FCC has not set out in this proceeding to set intrastate rates, and that the NPRM² does not state otherwise.

Section 152 of the Communications Act of 1934, 47 U.S.C. § 152,³ establishes that telephone calls that originate and terminate within the boundaries of one state are the exclusive province of the resident state commission.

¹ Securus also has reviewed the letter from these parties dated June 28, 2013, which raises the same request for relief as the letter filed June 19. It mentions, without language or explication, “Sections 201, 205 and 276 of the Communications Act.”

² *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, FCC 12-167 (2012), published at 78 Fed. Reg. 4369 (2013).

³ Section 152(b) states, in pertinent part:

[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier

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The United States Supreme Court has applied Section 152 strictly, refusing even to permit federal prescription of limits on the cost inputs that factor into ratesetting. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).⁴ Even under the Telecommunications Act of 1996, where Congress has authorized the Commission to regulate intrastate telecommunications matters, the Court held that the final act of setting prices is outside the bounds of FCC jurisdiction. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999).

Despite this clear authority, the Wright Petitioners make a request for federally mandated intrastate calling rates. They rely on nothing more than (1) the Commission's previous consideration of a similar improper request in 2002 that was not acted upon,⁵ (2) the notion of "intrastate-interstate parity", which appears in Paragraph 34 of the NPRM, under which interstate rates would mirror intrastate rates,⁶ and (3) the comments of three parties, Telmate, Global Tel*Link, and CenturyLink,⁷ all of which appear to have been misinterpreted by the Wright Petitioners.⁸ These sources are of no help to Petitioners' cause.

⁴ "Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes." *Id.* (emphasis in original).

⁵ "As far back as 2002, the FCC considered direct regulation of intrastate rates, and called for comment on cost and revenue data for local ICS collect calls to determine how to potentially regulate intrastate rates consistent with the demands of Section 276." Wright Letter at 1 (citing CC Docket No. 96-128, *Order on Remand and Notice of Proposed Rulemaking*, 17 FCC Rcd. 3248, 3277 (2002)).

⁶ "In the most recent NPRM, the FCC observed that the regulation of interstate calls could influence intrastate rates, and called for comment on the relationship between intrastate and interstate rates." *Id.* (citing "NPRM, at 13-14").

⁷ *Id.* at 2 (citing CenturyLink Comments at 4, 16; "Telmate" Comments at 4, 8-10; "GTL" Comments at 32-33).

⁸ Petitioners also rely on the Comments of PayTel Communications Inc. which purport that Section 276 of the Act – more specifically, the payphone service provider ("PSP") compensation clause in Section 276(b)(1)(A) – authorizes the Commission to set intrastate calling rates. That position is, for the reasons already explained, flawed and contrary to Section 152 and longstanding Supreme Court precedent. PSP compensation is a clear, discrete, and narrow grant of rulemaking authority and cannot reasonably be applied to the setting of retail end user rates for intrastate calls. PayTel also invites the FCC to set rates for financial transactions which, as Securus has explained, is not an action authorized by the Communications Act. Reply Comments of Securus Technologies, Inc. at 14-17 (Apr. 22, 2013).

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First, the FCC chose not to adopt rates of any kind in its 2002 review of inmate calling rates. Nothing in that docket could reasonably be seen as precedent to support what would be an unprecedented federal incursion into state rulemaking authority.

Secondly, the FCC's mention of "intrastate-interstate parity" in Paragraph 34 in no way supports federally mandated intrastate calling rates. The FCC merely asked:

To the extent that interstate rates for inmate calling services are significantly higher than intrastate rates, how would a requirement that ICS providers set interstate rates at a level no higher than intrastate, long-distance rates affect the justness and reasonableness of those rates?

Then the Commission asked some basic factual questions:

How many states set rates specifically for ICS? What is the rate structure for ICS calls in those states, and what are the rates for intrastate, long-distance calls? How do states that set specific ICS rates ensure that ICS providers are "fairly compensated?" How do intrastate, long-distance rates differ between states that establish general rate caps and those that set specific caps for ICS?

The "parity" discussion closes with a final question: "If the Commission adopts a parity principle, should there be any exceptions to that principle?"

Paragraph 34 is not a pronouncement that the FCC wants to, is authorized to, or is poised to set intrastate inmate calling rates. And it certainly should not be read as legal authority of any kind.

In fact, the "parity" concept actually provides further grounds to reject the Wright Petitioners' new request – it would require *interstate* rates to mirror *intrastate* rates. The intrastate rates would remain, as they should, the work of state commissions.

Third, the Wright Petitioners misunderstand the comments on which they rely.

- Telmate has not asked the Commission to set intrastate calling rates. Rather, it states that

Interstate ICS prices have for years, and increasingly so today, in effect cross-subsidized local ICS rates held below cost by state, county and municipal corrections officials. Without careful calibration, **a federal cap on interstate**

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inmate rates, while reasonable on a stand-alone basis, **could in fact kill the business by making it financially unprofitable overall**, for both traditional and new providers.⁹

- Global Tel*Link likewise does not advocate federal rates for intrastate calls. To the contrary, it notes how difficult it would be for the FCC to encroach on state ratemaking authority:

FCC intervention in issues subject to state regulation — including intrastate ICS rates — **would be appropriate only if there were no other way for the FCC to carry out its mandates under the Act.**¹⁰

Global’s final position is that

While the FCC has certain obligations under the Act, the historic regulation of prisons by the states and the unique challenges presented by state prisons and ICS, **place regulation of ICS more appropriately with the states.**¹¹

- Nor does CenturyLink support Wright Petitioners’ request for FCC-adopted intrastate rates. In fact, CenturyLink does not support the adoption of any calling rates at all.¹²

CenturyLink argues that

Caps on ICS rates have the potential to stifle innovation or otherwise limit services available to facilities, particularly enhanced security/investigative services. Current security/investigative services sought by facilities include voice biometrics, word search, speech-to-text conversion, and the integration of

⁹ Telmate Comments at 10 (emphasis added).

¹⁰ Global Tel*Link Comments at 33 (emphasis added). Global went on to discuss federal caselaw in which courts reaffirmed the right of state authorities to prescribe the method in which inmate calling services are provided. *Id.* at 33-34 (quoting *Arsberry v. Illinois*, 244 F.3d 558, 564, 565 (7th Cir. 2001); *U.S. v. Michigan*, 940 F.2d 143, 154-55 (6th Cir. 1991)).

¹¹ *Id.* (emphasis added).

¹² “CenturyLink cannot support the Petitioners’ proposal that the FCC establish benchmark rates for interstate, interexchange ICS.” CenturyLink Comments at 4.

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multiple databases. **Rate caps are a disincentive** for the development of more advanced services that, when initially introduced, will result in higher costs.¹³

To the extent CenturyLink mentions intrastate rates, it addresses the problem of call-diversion schemes that enable inmates to place, and pay for, a local call that actually, via VoIP-based call forwarding, is a long distance call. Though primarily a severe breach of prison security, these schemes are also a form of rate arbitrage. With regard to that arbitrage, CenturyLink states

The most effective way to prevent these arbitrage practices is to eliminate the economic incentive to engage in such practices. This can best be accomplished by equalizing rates across jurisdictions – local, intrastate interexchange, and interstate interexchange. **The facilities are best positioned to act to accomplish this.**¹⁴

Contrary to the citations in the Wright Letter, none of these parties support the Wright Petitioners' demand.

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For all these reasons, the Commission should not accept the Wright Petitioners' request to expand this proceeding to set benchmark rates, rate caps, or rate structures for intrastate inmate calling rates.

Please do not hesitate to contact me with any additional questions or concerns: 202.857.6081. Thank you for your consideration.

Sincerely,

s/Stephanie A. Joyce

Counsel for Securus Technologies, Inc.

cc: Acting Chairwoman Mignon Clyburn
Commissioner Jessica Rosenworcel

¹³ CenturyLink Comments at 6 (emphasis added).

¹⁴ *Id.* at 16-17 (emphasis added).

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Commissioner Ajit Pai
Julie Veach, Chief, Wireline Competition Bureau
Sean Lev, General Counsel
Rebekah Goodheart, Legal Advisor to Acting Chairwoman Clyburn
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